**Case Number: 3325501/2017**

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Dr D Guskov** | **v** | **Papworth Hospital NHS Foundation Trust** |

**Heard at:** Bury St Edmunds

**On:** 15, 16, 17, 18 and 19 January 2018
8 and 9 March 2018 } (Discussion days, no parties
6 April 2018 } in attendance)

**Before:** Employment Judge Postle

**Members:** Mr D Sutton and Mr R Thompson.

**Appearances**
**For the Claimant:** In person.
**For the Respondent:** Mr Higgnett, Counsel.

## RESERVED JUDGMENT

1. The claimant's claim that he suffered detriments for making public interest disclosures under the Employment Rights Act 1996 is not well founded.

2. The claimant's claims for race and sex discrimination under the Equality Act 2010 are not well founded.

## RESERVED REASONS

1. The respondent is an NHS Foundation Trust responsible for delivering health care at Papworth Hospitals. The respondent is one of the largest specialist cardio thoracic (heart and lung) hospitals in Europe and includes the country's main heart and lung transplant centre. The respondent is also the largest Respiratory Support and Sleep Centre (RSSC) employing approximately 1900 people.

2. The claimant was a second year nursing student with the Anglia Ruskin University on a placement within the respiratory support and sleep centre. The claimant's placement with the RSSC ward began on 3 January 2017 and ended on 22 February 2017. The claimant failed his formative and summative assessments during his placements with the respondent. As a result of which, the claimant would be required to redo the whole placement, retaking the failed placement would lead to an extension to his training as a registered nurse. This would mean the claimant may not be able to complete his training as a registered nurse within 3 years. It is understood that the claimant took a period of intermission from his training as a registered nurse following the failure of his placement with the respondent but now is undertaking a further placement in another Trust.

3. The claimant brings a number of claims before the tribunal particularly public interest disclosure under the Employment Rights Act 1996, claims for sex discrimination and race discrimination based on s.26 of the Equality Act 2010, namely harassment. These consist of some eleven protected disclosures which the claimant asserts following which he suffered detriments. The detriments having been identified by the claimant at the preliminary hearing on 27 September 2017 before Employment Judge Sigsworth (95) being those identified in paragraph 21 of the particulars of claim (60). The claimant asserts that those disclosures were made either to the respondent or to Anglia Ruskin University where the claimant was undergoing his studies.

4. For the avoidance of doubt the disclosures are:-

    1 Regular non-use of sliding sheets for patients.

    2 Non-observance of infection control measures by physiotherapists.

    3 Pressurising time management expectations.

    4 Again, pressurising time management expectations.

    5 Non-observance of infection control measures by doctors.

    6 Withholding care for the patients preparing for discharge.

    7 Long absences of nurses in the assistance areas.

    8 Inconsistent medication administration practices.

    9 The non-review of DNAR forms.

    10 Inappropriate practices of administration and recording of controlled drugs.

    11 Inadequate care without patient consent.

5. The detriments as the claimant clarified at the preliminary hearing are those matters set out in paragraph 21 of the claimant's ET1 (page 60), namely:-

   a. The manner in which the Summative Assessment was carried out on 21 February 2017 by Terry Alegre and Claire Jones causing the claimant distress and anxiety.

   b. Statements that had been made in the claimant's placement book on 21 or 22 February by Terry Alegre.

   c. Terry Alegre's decision to fail him on his placement on 21 February 2017.

6. The disclosures made by the claimant to the respondent fall under s.43 of the Employment Rights Act 1996 and are subject to the requirements of s.43B. The disclosures made by the claimant to Anglia Ruskin University fall under s.43G and are subject to more stringent requirements of that section.

7. In this tribunal we have had the benefit of a witness statement from the claimant dated 19 December 2017, and statements on behalf of the respondent from Mr T Bottiglieri clinical education facilitator, Miss T Alegre senior staff nurse, Miss C Jones clinical practical development sister, Miss S Ladner staff nurse and Miss A Short senior staff nurse all giving their evidence through prepared witness statements.

8. The tribunal also had the benefit of a bundle of documents consisting of 495 pages, with further additional documents being provided during the course of the second day of the hearing.

9. Notwithstanding the orders made at that the preliminary hearing by Employment Judge Sigsworth, particularly with regard to the exchange of witness statements which was ordered to take place on 20 December 2017. The claimant nevertheless produced on the first day of the hearing a document titled 'Further draft supplemental witness statement' which he had apparently sent to the respondent around the 9 January 2018. The claimant describes this document as 'intending to counteract new contentions and the statements of the respondent's witnesses'. The respondent not surprisingly objected to this additional substantial draft supplemental witness statement, particularly as there had been no provision in Employment Judge Sigsworth's orders for supplemental witness statements. The order made at the preliminary hearing was clear to quote:-

> "On or before the 20 December 2017 the parties are ordered to mutually exchange witness statements, including a statement from the claimant, setting out all the evidence that the witness wishes to give in the case including the issues of remedy, the claimant should also send to the respondent an updated schedule of loss if his circumstances have changed."

10. The above order could not be in clearer terms even for a lay person. It is therefore not open for any party to produce supplemental witness statements after the exchange of witness statements simply to respond or counteract evidence. Either a witness whether it be a respondent or a claimant knows their evidence they wish to give to tribunal or don't, they do not need to rely upon seeing each other's witness statements.

11. The respondent objected to the provision of this further draft supplemental witness statement. The tribunal were unanimous in their opinion that providing this additional witness statement the claimant was abusing the process and to allow this to be admitted in evidence, was not only in breach of the orders made on 27 September, but more importantly a prejudice to the respondent. Particularly as this witness statement raised entirely new matters. The tribunal agreed the claimant's particulars of claim which were extremely detailed and set out his claim could be used as a form of witness statement in conjunction with the claimant's original witness statement of 9 December 2017.

12. The claimant also at the outset of the full merits hearing made an application to have the respondent's response struck out on the grounds that it was in some way "scandalous, unreasonable conduct and an act of criminal forgery". The claimant supported this by asserting that the respondent had failed to comply with 3, 4, 6 and 7 of the Act. On enquiring precisely, what the claimant was referring to the tribunal were unable to ascertain what these breaches were and what Act was referred to. The claimant did say the respondent had not disclosed all the documents he had requested. Again, when the tribunal questioned the claimant as to specific documents, originally, he was unable to identify what it was the respondent had failed to disclose. The claimant appeared to be suggesting that he requested each and every email concerning him, particularly that had taken place between the respondent and Anglia Ruskin University.

13. The claimant was given until the afternoon to consider and identify precisely what the respondent had failed to disclose. The claimant produced a list of documents entitled "List of emails undisclosed by the respondents". The tribunal went through the list and it transpired that many were already disclosed and contained in the joint bundle, originally numbers 9-12 could not be found, and also 17-22. The respondent nevertheless tried to find these remaining documents otherwise all other documents that the claimant was alleging had been undisclosed were in fact disclosed in the bundle.

14. The following morning the respondent was able to produce all the remaining documents including 9-11. The only documents they could not find after a proportionate search was document number 19.

15. Amazingly, the claimant then wanted to make another application for further discovery. The tribunal unanimously were of the view that there were no grounds for a strike out against respondent, and therefore refused that application. Further, the claimant's additional application for further discovery appeared to the tribunal to be disproportionate, as far as the tribunal could ascertain it would not assist the tribunal with the issues that need to be determined.

16. The tribunal then proceeded to case manage the remainder of hearing in terms of timing of cross examination for each of the witnesses to ensure proportionality in the proceedings. Closing speeches took place on Friday morning/Friday afternoon.

Disclosure No 1 - Regular non-use of sliding sheets for patients

17. The claimant alleges that on a date unknown between 3 January 2017 and 27 January 2017 he made an oral disclosure to the Trust, specifically, to Miss T Alegre about inconsistent practices regarding the use of sliding sheets to move patients. The claimant alleges he made the same disclosure in writing to Anglia Ruskin University specifically to Miss Anabel Simpson by way of an email dated 28 January 2017 (365) (the claimant's tutor). Which contains reference to a discussion the claimant allegedly had with Miss Alegre about sliding sheets.

18. The email to Miss Simpson on 28 January 2017 was in the context of the claimant defending himself against Miss Alegre's judgment at the formative assessment on 27 January; that the claimant had often argued in front of patients. It is clear that sliding sheet are not being referred to by the claimant in the context of reporting a malpractice. That particular email then goes onto describe the conversation the claimant had with Miss Alegre regarding the use of sliding sheets and the claimant's understanding of the conversation that using sliding sheets to move patients constituted "best practice". The claimant then described that conversation, and suggests that at that episode it cannot "justify Alegre's statements by arguing with her in front of patients" (365).

19. It is clear based on the claimant's own account of the undated conversation with Miss Alegre in that email that there is quite simply no oral disclosure of information capable of protection under s.43B.

20. The reason for tribunal's conclusion is that the claimant's conversation with Miss Alegre is at best, describing best practice not malpractice. At the highest all the claimant is suggesting in that email is he reported to Miss Alegre that he had witnessed a patient being moved on a previous occasion without a sliding sheet, and that led to the conversation about best practice.

21. More importantly, the claimant does not suggest there was a breach of a legal obligation or malpractice to the patient.

22. The tribunal therefore concludes that the claimant did not make any oral disclosure of information to Miss Alegre capable of protection under s.43B or any written disclosure to Anabel Simpson capable protection under s.43G of the Employment Rights Act 1996.

23. The tribunal goes further, even if the claimant had made a disclosure of information concerning sliding sheets it would not be a protected disclosure because carelessly the claimant had failed to identify any policy, rule or regulation in relation to the use or non-use of sliding sheets capable of supporting his reasonable belief that a malpractice had or was occurring. Secondly, the claimant failed to consult relevant Trust procedure before making the disclosure, and that is the Trust's 'Moving and Handling Procedures' (275A-D). Therefore, there are no grounds for a reasonable belief that a malpractice was occurring. Thirdly, the only requirement in relation to moving patients in the respondent's policy is for a mobility assessment to be undertaken, the results of which may or may not require risk assessment to be carried out (275E). Fourthly, there is nothing in the evidence which supports the claimant's allegation the respondent was in some way concealing this malpractice.

24. In relation to alleged disclosure to the university under s.43G, as there is no evidence that the written disclosure of 28 January 2017 was ever brought to the Trust's attention and therefore it is impossible that could have caused any of the alleged detriments.

<u>Disclosure No 2 - Non-observance of infection control measures by physiotherapists.</u>

25. The claimant alleges that on 20 January 2017 he observed two physiotherapists treating a barrier nursed patient, put the patient's table into a corridor in order to create more room for the interventions. The claimant alleges that arising from this incident he considered there was a breach of infection control rules since the table was not cleaned before being placed in the corridor. The claimant alleges that he made, an oral disclosure to Miss Alegre regarding this on the same day, a written disclosure to the Trust later that day via his entry into his coaching book (349) and an oral disclosure to the University, specifically to Liz Hart on 2 February 2017.

26. The respondent was unable to say whether or not the claimant discussed this episode with Liz Hart of Anglia Ruskin University on 2 February, and if he did on what terms, as there is simply no evidence before the tribunal that he discussed it with Liz Hart other than his assertion before this tribunal.

27. In so far as the claimant's written disclosure about the matter is concerned, he told the tribunal he relied on the following extracts from the coaching book (349):

> "Strictly observed clear procedures while assisting with personal care in bed and medical administration discussed with DT taking out patients table from his room."

28. By any objective view, this is not a disclosure of information for the purposes of s.43B and s.43G; the facts recorded are simply insufficient to amount to a disclosure of information. There is simply no malpractice of any kind whether expressly or by implication.

29. More importantly what is contained in the coaching book is entirely consistent with Miss Alegre's evidence regarding what she says the claimant said to her about the matter:

> "He told me a table had been left outside the patient's room, but that is all. He did not say he thought it was wrong or that it was an infection control risk."

30. Even if the tribunal were to conclude a disclosure of information concerning infection control had been made, it is not protected because the claimant has failed himself to identify any policy, rule or regulation in relation to infection control measures capable of supporting a reasonable belief that a malpractice had or was occurring. The claimant had failed to consult any relevant procedures before making the disclosure, particularly infection control policy (150-166), the procedure for cleaning and disinfection of patient equipment and environment (207A-Z) and the isolation and standard precautions procedure (291A).

31. According to the isolation procedure at 291A patient equipment should be cleaned by nursing staff in accordance with the DN11 'cleaning and disinfection procedure'. The procedure for cleaning and disinfection of equipment and environment provides:

> "All patient equipment including patient tables are to be cleaned and disinfected daily as per (207Q) with combined detergent and chlorine."

32. The policy itself is not capable of supporting any belief that a table required re-cleaning when placed in a corridor, and furthermore if the claimant genuinely believed there was an infection control risk he could have cleaned it himself or taken steps to ensure it was cleaned. On the claimant's own evidence, he did neither. Furthermore, on the claimant's own evidence this was a single observation on 20 January 2017. A single incident is not capable of sustaining the claimant's belief that there was common practice of infection control procedures being ignored by the respondent.

33. The claim fails on all grounds.

Disclosure No 3 - Pressurising time management expectations.

34. The claimant alleges that on 4 February 2017 whilst working with Miss Jones dressing a patient's wounds and when making the relevant entries in the patient's care book he noted that a food chart and a nutritional care plan for the patient were missing. The claimant alleges that he made an oral disclosure to both Miss Alegre and Miss Jones regarding these matters. The claimant further alleges that he made a written disclosure about missing care plans to Anabel Simpson by email of 5 February 2017 (359-360).

35. It is accepted that it is part of the Nursing and Midwifery Council's Code, there is a requirement to record care plans properly. It is accepted that if concerns had been raised by the claimant regarding missing documentation then if those concerns had been raised with Miss Alegre she would have tried to find the documentation. In the absence of such documentation she herself created a care plan for that day. She would have also investigated with the nurse who had previously cared for the patient to explain why there was no care plan. There was no attempt by Miss Alegre or indeed anyone else to deliberately conceal the above concerns.

36. Whether or not the claimant's written disclosure to the University therefore satisfies the requirements of s.43G of the Employment Rights Act 1996 (which the claimant failed to address in any of his evidence) there was no evidence that the claimant's email to Anabel Simpson of 5 February (or the relevant parts of it) were brought to the attention of the Trust and therefore the disclosure cannot have caused any of the detriments to which the claimant relies upon (358-361).

37. As far as the alleged oral disclosure is concerned, neither Miss Jones or Miss Alegre recall the claimant raising the issue of the missing care plans. The tribunal are entirely satisfied with their explanation as to what Miss Alegre and Miss Jones would have done had the issue been raised with them.

Disclosure No 4 - Pressurising time management expectations.

38. This disclosure is about mistakes allegedly made on a patient admission document (specifically that the patient's MUST score) on 9 February 2017. It appears the claimant's case is that he made:

    a) An oral disclosure to Miss Jones and Miss Alegre about the episode on 9 February 2017.

    b) A written disclosure to Anabel Simpson at Anglia Ruskin University by email of 10 February 2017.

c) An oral disclosure to Mary Edmunds at the University on 14 February 2017, the email referred to 10 February is at page 376.

39. MUST stands for Malnutrition Universal Screening Tool. MUST is a five-step screening tool to identify adults, who are malnourished, at risk of malnutrition or obese. The Trust policy (149G-AH at page 5, appendix 8) states that a risk assessment including a MUST score must be performed within 24 hours of admission.

40. The claimant alleges that the nurse he observed, Kasha, noticing the patient's weight had been recorded incorrectly in the admission assessment document took steps to correct it. The claimant accepts in oral evidence that by correcting the matter Kasha was behaving correctly. There is no evidence this incident occurred beyond what the claimant asserts.

41. The tribunal accepts that had the claimant observed this or the nurse he was working with he would be obliged to report it on 'Datix'. No such report was ever made. Furthermore, Miss Alegre and Miss Jones have no recollection of the claimant reporting a concern to them about this incident on 9 February. In any event the claimant's own oral evidence that he reported and discussed the matter with Miss Alegre on 9 February is contradicted by his email to Miss Simpson on 10 February (376) as the claimant does not say in this email that he reported the matter either to Miss Alegre or Miss Jones.

42. The tribunal concludes on the balance of probabilities that the incident simply did not occur, and even if it did it cannot objectively describe it as the claimant having a reasonable belief in malpractice and thus none of the alleged disclosures would be protected.

<u>Disclosure No 5 - Non-observance of infection control measures by doctors.</u>

43. This disclosure relates to control measures and concerns an episode on 10 February 2017 whilst working with Miss Alegre in observing doctor performing a tracheoscopy (a tube change) procedure wearing non-sterile gloves.

44. The claimant makes his disclosure orally to Miss Alegre on 10 February and in writing to Anabel Simpson on 13 February (374).

45. The rules are found in the Trust's 'A Septic Procedure' (190) paragraph 6.3. Whether sterile gloves are required depends on whether the procedure can be carried out without touching the key part or key site. It is clear that a two-tube procedure, carried out by a doctor that does not touch a key part or site that sterile gloves will not be required.

46. The alleged disclosure of information relied upon by the claimant for the purposes of his oral disclosure is the claimant asking Miss Alegre about the differences between the practice of nurses and doctors in the choice of gloves to carry out this procedure. Miss Alegre told the claimant that doctors carryout the procedure using non-sterile gloves. That is clearly entirely consistent with the Trust's policy.

47. It is clear from the evidence the claimant did not follow up the matter with either Miss Alegre or that he alleged that Miss Alegre considered this malpractice or in breach of any procedure. On the claimant's own admission, he did not even consult the Trust's policy at the time of the disclosure or subsequently. Moreover, even after Anabel Simpson encouraged the claimant to look at the relevant guidelines and policy it is clear from the claimant's evidence that he did not (374). Therefore, the claimant cannot have possessed a reasonable belief at the time of the disclosure that what the doctor did constituted a form of malpractice specified in s.43B of the Employment Rights Act 1996.

48. In so far as the alleged disclosure to Anabel Simpson via the email of 13 February 2017, this fails for the reasons given above but also because the claimant has failed to address in his evidence that he did meet the stricter requirements of s.43G of the Employment Rights Act 1996.

<u>Disclosure No 6 - Withholding care for the patients preparing for discharge.</u>

49. The claimant alleges that an email dated 14 February to Mary Edmunds at Anglia Ruskin University and 16 February 2017 to Mr Bottiglieri he makes disclosures concerning an incident where Miss Ladner withheld care for a patient.

50. It is agreed between the claimant and the respondent that the alleged disclosure relates to an incident on 14 February when the claimant was working with Miss Ladner caring for a patient who had been on a 24 hour admission and was awaiting discharge that day. There was prescribed cream on the patient's medical admission administration record which the patient had forgotten to bring with them to the hospital (cream for itching skin) (368).

51. The claimant asked Miss Ladner if an alternative cream was available in the drug room. Miss Ladner informed the claimant that it would not be appropriate or necessary as the patient was about to be discharged and would have the opportunity to apply the cream when that patient got home.

52. It is clear the claimant's concerns in his email were raised not in the context of any asserted malpractice regarding withholding patient care but in the context that Miss Ladner allegedly being absent from the ward for long periods (383). If one looks at the email at page 383 on which the claimant relies upon, it describes the incident and then says; "I am not sure whether this is correct", he does not assert in the email as per his particulars of claim at paragraph 8.20 that the patient's health care was

being compromised as a result of Miss Ladner's decision to discharge the patient without applying the cream, or that Miss Ladner's actions were in breach of the Nursing and Midwifery Council's Code. Furthermore, he does not allege the incident typified recurrent failures by the respondent's staff to observe the various codes.

53. The above is consistent with Miss Ladner's evidence that she discussed the episode with the claimant on the day, and the claimant did not raise with her concerns about her actions.

54. Furthermore, the claimant cannot point to a legal obligation that Miss Ladner breached. It was a clinical judgement clearly by an experienced nurse whether to discharge the patient without applying the cream. Miss Ladner was making her clinical judgement and completed the medical administration record correctly. That form requires where a prescribed drug is not administered the reasons for it are to be recorded in the document. That is precisely what Miss Ladner did, in the circumstances there is clearly no breach of any legal obligation.

55. In any event the disclosure if it was made was not protected because on the claimant's own evidence he did not have a reasonable belief. Particularly the claimant's mistaken belief the patient was suffering from lymphedema, that diagnosis if true would have been on the patients record. It was not. Furthermore, even if the patient had been suffering from lymphedema the cream would not have assisted that condition.

Disclosure No 7 - Long absences of nurses in the assistance areas.

56. The claimant alleges that there were long absences of Sarah Ladner and Allison Short from the assistance areas in the ward. The claimant asserts he made disclosures to Mr Bottiglieri in emails of 16 February and 22 February (381 and 386).

57. At this stage of the proceedings the tribunal were provided with a map/plan of the relevant ward.

58. It is clear the claimant given the plan of the ward the tribunal saw would have been able to find nurses to assist him. Miss Short the nurse in charge on 14 February would do ward rounds with doctors which could take a couple of hours and would spend time on side wards with invasively ventilated patient on that day. It would not have been difficult to find her.

59. The claimant appears to rely on the facts contained in the email consisting of:

> "Later I did not see Sarah very often in the bay or elsewhere …. Back to Sarah's absence in the main bay for long periods of time ….. eventually I saw Sarah".

60. The nurses would have been available at the ward throughout the claimant's shift if the claimant were to make reasonable enquires for them. The facts in themselves which the claimant alleges simply are inadequate to constitute a disclosure of information. It seems to be the case that when the claimant looked for any particular nurse, particularly Miss Ladner he found them or her. There is no suggestion of patient safety being threatened. The tribunal is at a loss to understand what legal obligation the claimant relies upon. There is no requirement for a nurse to be stationed at a particular place in the ward. There is simply not on the facts a qualifying protected disclosure.

Disclosure No 8 - Inconsistent medication administration practices (the pill cutter).

61. The claimant's concern was regarding the absence of a pill cutter on several wards, concern regarding the administration of medicine in breach of the Nursing and Midwifery Council's Code by Miss Ladner not checking the British national formula for the dose ranges of drug before dispensing the medication.

62. The claimant asserts that he made the disclosure on 16 and 22 February to Mr Bottiglieri. A pill cutter was required for the administration of one of the medications and a pill cutter could not be found on the ward. The claimant was asked to borrow one from a neighbouring ward. The claimant was instructed by Miss Ladner to ring pharmacy and obtain one. The claimant said he did not know how to use the telephone system. The tribunal was shown a photo of the ward phone and the telephone directory. All that was required was to dial 4247, no more no less. Ultimately a ward clerk telephoned the pharmacy and was asked to pick up the pill cutter and the patients medication was administered. Quite what the qualifying public disclosure is the tribunal is at a loss to understand the claim.

63. In relation to the second part of this disclosure, administering drugs known as Pregabalin, it is accepted that claimant made written disclosures concerning the administration and dispensing of the drug on a shift on 14 February and email 382-384 forwarded to the Trust on 16 February.

64. It is clear that Miss Ladner did not instruct the claimant to dispense the drug and check the BNF Guide afterwards. Further, a clinical judgement by Miss Ladner that the prescribed dosage whilst outside guidelines was safe, upon instruction from a doctor. There was no malpractice. In any event doctors can and do prescribe amounts "off label" which means the dose is outside the licenced amount.

65. It was not a case where Miss Ladner instructed the claimant to dispense the drug and check the BNF Guide, it was simply a clinical judgement by Miss Ladner that, whilst outside the guideline, dosage was safe and the claimant was informed of this by Miss Ladner.

66. The tribunal repeats the claimant could not have reasonably believed at the time that there was any malpractice of any kind.

Disclosure No 9 - The non-review of DNAR forms.

67. The claimant made an oral disclosure to Miss Jones on 20 February 2017 about the practice of the respondent's doctors not reviewing completed DNAR forms (Do Not Attempt to Resuscitate). He made a written disclosure in his reflective diary completed the same day.

68. The Trust's policy on externally completed forms is found at page 239. If a patient is admitted with an East of England DNAR form then provided the form is valid and in date, it will be acceptable to the Trust. That is to say the patient will not be resuscitated. A separate procedure exists for reviewing the DNAR forms 72 hours after admission (239).

69. The claimant's belief that a patient with an externally completed DNAR form should have been reviewed by a doctor at the Trust in all cases is not correct, because though the claimant's own account his belief was based on experience of a student nurse whom he recounted to him at a discussion group meeting, a person's personal experience of a practice regarding DNAR forms at Addenbrooke's Hospital. Further, the claimant had not even consulted the respondent's policy at the time he made his disclosure. It is clear the claimant had no reasonable grounds for believing that externally completed DNAR forms should not be accepted unless countersigned by a doctor at the Trust. It is also important to note that although the claimant said it was raised in his reflective diary, the reflective diary in no way supports the allegations he makes in his particulars of claim at paragraphs 8.28 to 8.30. There is in fact nothing in the claimant's reflective diary regarding a practice regarding DNAR forms being reviewed by doctors. There is furthermore nothing in the diary entry referencing his belief that the Trust's practice was in breach of policy or endangering patient's safety.

70. Given the contents of a reflective diary and the absence of the allegation of malpractice, it would seem that on the balance of probabilities unlikely the claimant made any oral disclosure alleging malpractice to Miss Jones on 20 February.

Disclosure No 10 - Inappropriate practices of administration and recording of controlled drugs.

71. The claimant alleges that on 21 February he witnessed Miss Short and Miss Alegre administer a dose of Oramorph using a pink syringe which resulted in the patient receiving 0.05 ml less than the prescribed dose. Oramorph being a controlled drug. Further that Miss Alegre signed off the dose dispensed as 1.25 and not 1.20 as administered. It is clear that patient safety was not in danger, and this was accepted by the claimant. The tribunal were in fact provided with a syringe and the difference in dosage is so deminimus that it is almost impossible to see the difference.

It is also impossible to be a hundred percent accurate given the very small difference in amount of 0.05 ml.

72. The claimant accepts that he did not raise his concerns with Miss Alegre or suggest there was any malpractice. Therefore, there is simply no question of the claimant having a reasonable belief that some form of malpractice has taken place.

Disclosure No 11 - Inadequate care without patient consent.

73. The claimant alleges that he made disclosures about hypothermic patient being given inadequate care by Miss Alegre on 12 February 2017 contrary to the Nursing and Midwifery Council's Code, and orally on 21 February to Miss Alegre and Mr Bottiglieri, and also in writing to Mr Bottiglieri and Miss Edmunds on 22 February (388).

74. The claimant alleged that a window in a patient's room was opened without consent. Apparently, the window was not open for any length of time and was promptly closed when the matter was raised. There was no evidence that the patient's safety was endangered. Again, the tribunal finds it difficult to believe that the claimant would believe that the episode represented a failure on the part of Miss Alegre to provide adequate care in breach of the Nursing and Midwifery Council's Code. There simply was no malpractice.

Detriments

75. The claimant says as a result of making those disclosures he suffered detriments, in particular:-

    a) The manner in which the Summative Assessment was carried out on 21 February 2017 by Miss Alegre and Miss Jones caused the claimant distress and anxiety.

    b) Statements made in his placement book on 21 or 22 February by Miss Alegre (330-331).

    c) Miss Alegre's decision to fail him on his placement on 21 February 2017.

76. The reason the claimant failed his summative assessment was that in Miss Alegre's opinion being the claimant's named mentor, the claimant simply did not achieve the grade 3 level that is expected of a year 2 student. The reason for that was the claimant required full supervision most of the time during his placement, which would not be expected from a year 2 student. The claimant needed to improve his communication skills exploring what the patient requires in order to develop a better rapport with patients and staff, and work more as a team player. The claimant needed to improve on applying his knowledge that he had gained from previous placements. The claimant

needed to further develop his confidence in exploring exactly what a patient required. That was the evidence of Miss Alegre and looking, and hearing from a number of the witnesses that worked with the claimant all of which were extremely professional and experienced nurses that appeared to them also how the claimant came across.

77. The tribunal do not accept there was any linkage between the alleged disclosures made by the claimant and the claimant failing his second year placement.

78. It would appear the allegation of racial harassment on 27 January was in relation to the claimant's/his wife's/his children's nationality being raised. Miss Jones denies raising any question relating to anyone's nationality. The claimant was asked if he has children, that was clearly in relation to an analogy about communication matters. It is worth noting the following day the claimant emails Miss Simpson at Anglia Ruskin University, his personal tutor. Although the claimant raises a number of issues he does not do raise any matters directly or indirectly that he has been the subject of some form of racial harassment. Even if the question of nationality was raised that falls a long way short of any harassment.

79. The second allegation on 27 January that Miss Jones made comments about Miss Alegre's accent and difficulties she encountered in understanding her which led to a discussion about the claimant's strong accent and his communication style. Again, there was no mention in the email to Miss Simpson about the claimant being offended or that he had been the subject of some form or racial harassment. Given that the claimant was clearly not backward in expressing his views and opinion, the tribunal found it surprising if the claimant had been subjected to racial harassment this was not raised in the email. The tribunal therefore do not accept the events occurred as outlined by the claimant and the claim for racial harassment is not made out.

80. There appears to be an additional allegation of sexual harassment at the meeting on 27 January, which quite clearly relates to the claimant's understanding of the conversation between the three parties. That related to a question as to how the claimant was getting on with Anabel Simpson his personal tutor which the claimant misunderstood. The claimant believed an assertion was being made that he was in an inappropriate relationship with Miss Simpson. Quite simply the claimant got hold of the wrong end of the stick. Therefore, the claim for sexual harassment is simply not made out and fails.

81. In relation to the meeting between Miss Ladner and Miss Short on 14 February, their purpose was to get to the bottom of what happened on 14 February, particularly the argument between the claimant and Miss Ladner over the oxygen cylinder change. This was in relation to Miss Ladner making reference to the claimant being a tall man and potentially intimidating in the context of getting the claimant to

understand about respecting people's personal space. Miss Ladner is small in stature and young, and when this subject was raised it clearly was not sexual harassment. Furthermore, this incident is not raised in the claimant's emails at any stage to the university. The claim fails.

Creditability

82. The tribunal found the claimant to be essentially an honest witness, and nevertheless was clearly mistaken in his beliefs and at times unwilling to accept he was wrong, as against experienced and well qualified staff.

83. The tribunal found the respondent's witnesses professional, balanced and creditable. In particular, the tribunal was impressed by the evidence of Miss Ladner and Miss Alegre which was clear, concise, balanced and fair-minded.

**The Law**

S.26 of the Equality Act 2010 – Harassment

84. The tribunal has to consider whether the person has engaged in unwanted conduct related to a relevant protected characteristic, in this case race and sex.

85. Such conduct must have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

86. The burden of proof under s.136 of the Equality Act 2010 essentially says, if there are facts which the tribunal could decide, in the absence of any other explanation that person contravened the provisions, then the tribunal must hold that the contravention occurred unless that person shows that they did not contravene the provisions.

S.43 of the Employment Rights Act 1996 – Whistleblowing

87. Essentially this provision provides that a worker must have made a qualifying disclosure in order to be protected against detriment or dismissal under the whistleblowing provisions contained in the Employment Rights Act.

88. In particular, disclosure of information which, in the reasonable belief of the worker making it, was made in the public interests and tends to show one or more of six specified types of wrongdoing has taken place, is taking place or is likely to take place – s.43B(1) of the Employment Rights Act 1996. Disclosure must also be made to one of the categories of people listed in s.43C-H. An employee will be deemed to be unfairly dismissed if the reason (or, if more than one, the principle reason) is that he or she made a protected disclosure – s.103A. A worker has the right under s.47B not to be subjected to any detriment

by his or her employer on the ground that he or she has made the protected disclosure.

_____
Employment Judge Postle

Date: …22.10.18……...

Sent to the parties on…22.10.18

.....
For the Tribunal Office